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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 163

JOHN BRENTON PRESTON, *Petitioner,*

v.

UNITED STATES, *Respondent.*

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Preliminary Statement and Summary of Argument

In its brief, the Government, admitting that "[o]n the bare record the case is close" (Br. p. 14), abandons the ground relied upon by the lower court but advances a number of new grounds to support the judgment. More specifically, while conceding that the officers did not have probable cause to arrest petitioner under the state vagrancy statute (Br. p. 18), the Government contends that the search and seizure here at issue were valid because: (1) the officers did have probable cause to arrest for violation of a municipal loitering ordinance; (2) while the record is unclear as to whether the arrest was actually made under the loitering ordinance, it should be presumed that it was; (3) at any rate, the arrest was valid as long as there was probable cause for an arrest for *some* crime, even though

not for the one the officers had in mind, and there was such probable cause here both with respect to the loitering ordinance and the state auto theft statute; (4) so far as the search and seizure are concerned, "although the point is not free from doubt" (Br. p. 24), they may be upheld as incident to an arrest for loitering; (5) at any rate, they were proper as incident to an arrest for auto theft; and (6) at any rate, they were proper entirely apart from the arrest because there was probable cause to believe the auto was stolen property.

The Government is wrong in all respects.

1. The record is clear that the officers arrested for vagrancy, not for loitering. There is a significant difference between the two provisions—the statute proscribes the acquisition of a status by repeated actions, whereas the ordinance proscribes a single act of loitering. The officers and prosecutors must be assumed to have known the difference and to have meant the vagrancy statute rather than the loitering ordinance when they spoke of the arrest for "vagrancy." Moreover, the burden of clarification, if clarification was needed, was on the prosecutor, who knew the true facts, not upon court-appointed counsel, who did not. See *United States v. Jeffers*, 342 U.S. 48, 51 (1951). ●

2. The Government cannot justify an arrest on grounds not considered by the arresting officer. In *Jones v. United States*, 357 U.S. 493 (1958), the Court rejected the similar argument that a search could be justified as incident to arrest on the ground that the record made clear that the officers' true purpose in entering the defendant's house had been to search, not to arrest. The same principle applies here: The officers must be held to their choice.

In any event, the question turns initially on the state law of arrest, and in Kentucky it is settled that the legality of an arrest depends upon the grounds assigned by the offi-

cer at the time of arrest, not upon whether he could have arrested on different grounds. *Gains v. Hudson*, 246 Ky. 517, 55 S.W. 2d 388 (1932); *Hogg v. Lorenz*, 234 Ky. 751, 29 S.W. 2d 17 (1930); other cases cited *infra*, p. 13.

3. Moreover, there was no probable cause to arrest petitioner either for loitering or for auto theft. As to the former, the ordinance is too vague to determine whether probable cause existed. And as to the latter, in addition to the consideration that the officers did not arrest for auto theft, the record indicates that there had been no report of theft of a car like Sykes' and that the officers had made no inquiry of the person from whom Sykes purchased the car. Moreover, parking for a long time in a downtown area at an unusual hour of the day would be the least likely thing for car thieves to do. Thus, while the conduct of the men obviously aroused the officers' suspicion, there was no basis for that suspicion to be related to auto theft.

4. At any rate, the Government's argument is made too late. Defense counsel was led by the officers' testimony to cross-examine and to introduce evidence in terms of the vagrancy statute, and petitioner would be prejudiced if the Government were to be free now to defend the arrest on different grounds. *Giordenello v. United States*, 357 U.S. 480, 488 (1958).

5. Assuming *arguendo* the validity of the arrest, the search and seizure were nonetheless illegal because: (a) With respect to an arrest for loitering, an accompanying search should not extend beyond that necessary to protect the officers and make the arrest secure. (b) In any event, the search was not sufficiently related to the arrest either in time or in purpose—the search was plainly an afterthought. (c) Moreover, there clearly was time to secure a warrant after the car had been taken to the garage; and to grant that the police in a proper case have authority to take a car into custody does not mean that they have the

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further authority to break into the trunk without a warrant once the car is secure. *Rent v. United States*, 209 F. 2d 893, 894 (5th Cir. 1954). (d) No crime was committed in the presence of the officers.

6. The search cannot be justified apart from the arrest under the doctrine of *Carroll v. United States*, 267 U.S. 132 (1925), not only because there was no probable cause and because the officers did not purport to search on the theory the auto had been stolen, but also because the *Carroll* doctrine applies only where there is danger that the auto might be moved. *Id.*, at 151, 153; *Rent v. United States*, *supra*.

7. Petitioner's silence cannot be taken as a waiver of his right to separate counsel, any more than was petitioner's silence in *Glasser v. United States*, 315 U.S. 60 (1942). As to prejudice, it is plain enough that there is a distinct possibility that petitioner was disadvantaged by the dual representation. The fact that on balance joint representation might conceivably have been helpful is immaterial, for petitioner was entitled to separate representation to decide this difficult question of strategy.

Argument

A. Validity of the Arrest

The arrest was invalid because (1) on this record, the only permissible conclusion is that the arrest was made for violation of the state vagrancy statute, as to which the Government no longer contends there was probable cause; (2) the arrest cannot be justified by an *ex post facto* consideration by the Court as to whether an arrest could have been made under some other statute; and (3) even if it were proper to consider other statutes, here there was no probable cause relating to any statute or ordinance.

1. *The arrest was made under the vagrancy statute.* The Government now maintains for the first time that the arresting officers might have had in mind a Newport loitering ordinance rather than the state vagrancy statute (Br. 15-16). The argument is that the loitering ordinance is really a vagrancy prohibition, and that the burden was on the petitioner to secure clarification as to what the officers meant when they referred to "vagrancy."

In the first place, the record does not require clarification. The initial fallacy in the Government's argument is its conclusion that the ordinance and the statute "cover essentially the same area" (Br. p. 15). Plainly, the elements of the provisions are not identical, and the Government does not suggest to the contrary. The question seems to be whether the differences are significant. They are.

The basic difference is that the Kentucky statute, as we pointed out in our opening brief (p. 18), falls into the general pattern of vagrancy provisions in that it makes a person's status, rather than his actions, a crime, whereas the ordinance is simply designed to permit the arrest of persons the police consider suspicious because of their conduct at the time, without regard to their past conduct. The fact that loitering is an element of both offenses (see subsections a and d of the statute) does not, as the Government appears to believe (Br. 15), support its argument. Rather, it supports ours, for in the statute the key word "habitual" is added to the word "loiters," thereby underscoring the essential difference between the provisions. For a similar indication of legislative awareness of this difference, see section 436.530, Kentucky Revised Statutes: "... If two or more vagrants habitually loiter about any street or public place, the officer shall disperse them. . . ."

One leading article describes vagrancy statutes in terms particularly appropriate here:

"The acts, or patterns of conduct, which constitute a proscribed status are of two types. First, there are those acts which, absent continued or habitual incidence, have no intrinsic criminal connotation, e.g., 'idleness,' 'wandering,' and 'loitering.' Such acts, otherwise innocent, may, however, through combination and repetition produce a criminal status. Second, status may be derived from acts which are usually criminal per se, e.g., 'begging', 'prostitution', 'gambling', and 'drunkenness'. When adopted as a course of conduct, these acts also produce a criminal status under the statutes." Note, *The Vagrancy Concept Reconsidered: Problems and Abuses of Status Criminality*. 37 N.Y.U.L. Rev. 102, 115 (1962). (Emphasis added; footnotes omitted.)¹

Thus, if it be assumed that the officers and the prosecutor understood the character of the statutes they were enforcing (as we submit it must), it should be concluded that, when the officers testified they arrested petitioner for "vagrancy" and when the prosecutor examined them about the "vagrancy" arrest, they were referring to the only true vagrancy statute within their jurisdiction. This conclusion is given added support, of course, by the fact that the statute and ordinance carry different names and that all of the officers, as well as the prosecutor, referred to the crime of "vagrancy," not that of "loitering." Finally, while the details of the officers' testimony are not particularly illuminating with respect to this question, statements such as "some of [the defendants] hadn't been employed for six months . . . so we arrested them for vagrancy" (R. 9) are

¹ See also the other authorities cited on page 28 of our opening brief.

more consistent with a charge of the status crime of vagrancy than of the crime of loitering.

Assuming *arguendo*, however, that the record is not clear as to whether the arrest was for vagrancy or for loitering, we submit that the Government is quite mistaken in urging that the burden of clarification was petitioner's. On the contrary, petitioner's counsel did all that should be expected of him when, to use one example, he examined the officers as follows:

"Q. You placed them under arrest?"

"A. Yes.

"Q. May I ask what charge you placed against them?"

"A. We charged them with vagrancy.

"Q. Vagrancy?"

"A. Yes, sir." (R. 8).

This response, together with like testimony from the other officers (R. 14, 20, 25), reasonably led petitioner's counsel to conduct his examination of witnesses in terms of the vagrancy statute. Thus, as we indicated in our opening brief (pp. 13-14), petitioner's counsel introduced detailed testimony as to the efforts of the defendants to secure employment, which was relevant to whether they had "habitually fail[ed] to engage in honest labor" or had "habitually refuse[d] to work" within the meaning of the vagrancy statute, but which would hardly have been relevant to whether they had a "legitimate business" at the time of the arrest under the loitering ordinance. (They were all then unemployed, it will be recalled.) Again, petitioner's counsel introduced evidence tending to prove that the defendants had not deserted their wives and family or habitually failed to engage in labor for their support. While this was evidence relevant to subsections 2(b) and

2(c) of the state statute, it had nothing to do with the loitering ordinance.

What the Government contends in effect is that petitioner's counsel was not sufficiently diligent in examining the officers. He should have asked, "When you say 'vagrancy,' do you mean the vagrancy statute or the loitering ordinance?" Apparently the Government believes that this might well have elicited the response, "I mean the loitering ordinance." If it had, it seems that even the Government would have been surprised at one point, since in the response to the petition for certiorari the Government assumed that the provision in question was the vagrancy statute (Govt. Opp., p. 7). We say that, if the officers misspoke, it was the prosecutor's responsibility to make matters clear. After all, the police and the prosecutor knew the facts, while petitioner's court-appointed attorneys did not. But all that the prosecutor did was to examine in terms of a "vagrancy" arrest (R. 9, 16, 23), which could do nothing but confirm petitioner's counsel in their view as to the statute involved.

In such circumstances, the rule announced in *United States v. Jeffers*, 342 U.S. 48, 51 (1951), is especially appropriate:

"Over and again this Court has emphasized that the mandate of the Amendment requires adherence to judicial processes. . . . Only where incident to a valid arrest . . . or in 'exceptional circumstances' . . . may an exemption lie, and then the burden is on those seeking the exemption to show the need for it. . . ." (Emphasis supplied.)

2. The arrest cannot be justified on the basis of an ex post facto determination that the officers could have arrested petitioners for the crimes of loitering or car theft. The Government maintains that, although the officers did not

have probable cause to arrest for vagrancy, and assuming they did not determine they had probable cause to arrest for any other crime, the arrest was nonetheless valid if in fact it appears to the Court that there was such probable cause respecting other crimes. The other crimes the Government suggests are loitering and car theft. In a later portion of the brief, we show that there was no probable cause respecting either crime. Here, we discuss the validity of the Government's "alternative probable cause" argument. That argument is unsound because (a) it squares neither with the Constitution (b) nor with the Kentucky law of arrest, and (c) in any event it is made too late in this case.

a. The Constitutional issue raised by the Government's argument is whether the requirements of the Fourth Amendment, so far as they pertain to arrests, can be met where the record discloses that, while the officers arrested for a crime as to which there was no probable cause and did not determine there was probable cause to arrest for any other crime, in fact it appears that there was. This is the question left open by the Court in *United States v. Di Re*, 332 U.S. 581 (1948),² except that here the Government's argument goes even further than in *Di Re*, since there the record did not disclose what crime the officers had in mind when they arrested. Because, as we show later, this question is not properly presented in this case any more than it was in *Di Re*, we discuss it only briefly.

While *Di Re* does not dispose of the Government's argument, in principle *Jones v. United States*, 357 U.S. 493 (1958), does. There a search and seizure were declared invalid because, although the officers had probable cause to

² "Assuming, without deciding, that an arrest without a warrant on a charge not communicated at the time may later be justified if the arresting officer's knowledge gave probable grounds to believe any felony found in the statute books had been committed. . . ." *Id.*, at 592. The Court held the arrest invalid on other grounds.

believe that liquor was being illegally distilled in a house, they searched the house at night with only a daytime warrant. In this Court, the Government for the first time attempted to sustain the search on the ground that it was reasonable to infer that the officers, in entering the house, were intent upon arresting rather than searching; that they had probable cause for such an arrest; and that once properly in the house they could seize all contraband in plain view. While unquestionably the officers did have probable cause to arrest, the Court nonetheless concluded that the Government's argument was not well founded because "[t]he testimony of the federal officers makes clear beyond dispute that their purpose in entering was to search for distilling equipment, and not to arrest petitioner." *Id.*, at 500.

Jones is identical in all material respects to the case at bar. In *Jones*, the objective facts would have supported an entry to make an arrest, just as here we assume for present purposes the objective facts would have supported an arrest for loitering or for auto theft. But in *Jones* the Court rested upon the fact that the officers had not intended to arrest but rather to conduct a search which turned out to be illegal, just as here the Court should rest upon the fact that the officers intended to arrest for a crime as to which there was no probable cause rather than for other crimes.²

² *Chapman v. United States*, 365 U.S. 610, 616 (1961), stands for the same principle as *Jones*, upon which it heavily relies. There the Court held that an entry into a house by a landlord and police for the purpose of making a search could not be justified on the ground that under local law the facts would have justified an entry for a different purpose—to view waste.

And see *United States v. Burke*, 215 F. Supp. 508, 510-511 (D. Mass. 1963), in which an arrest was held illegal, although an arrest for intoxication apparently would have been lawful, where there was no evidence that the arrest had been made for intoxication, and where the officers had no probable cause for believing that the person arrested was guilty of mail robbery, the crime under investigation.

The decisions the Government cites to support its contention that "it is clear that an arrest may be upheld on a theory which was not in the minds of the arresting officers" (Br. p. 27) are entirely beside the point, for in each of them the arrest was made for the crime that was in the minds of the officers.

The principle of *Jones*—that the officers must be held to their choice—is a sound one. In the first place, there is considerable sense in entrusting the initial determination, whether for or against arrest, to the officer on the spot. Undoubtedly the Government has from time to time argued that in a close case considerable deference should be paid the judgment of the officer who determined to make an arrest, since it is not always possible to recreate in a courtroom the atmosphere that existed at the time of the arrest. Similarly, where the officer did *not* conclude that there was probable cause, deference should be paid to that judgment as well. Moreover, the rule contended for by the Government would open the door to grave abuse. It is not likely that an officer will commit deliberate perjury. If, however, the prosecution could, months after the arrest, justify it on a basis not considered, and by hypothesis even rejected, by the arresting officer at the time of the arrest, there would be strong temptation for the officer to recall or to emphasize or to color facts not deemed significant at the time. There are safeguards against such distortions provided by such requirements as "booking", preliminary hearing, and statutory mandates to advise the person of the charge against him at the time of the arrest.⁴ These procedural safeguards, however, afford no protection if later justifi-

⁴ Kentucky has such a statute. See note 7, *infra*. See also *United States v. Di Re*, 332 U.S. 581, 588 (1948) in which some members of the Court were of the view that failure of the arresting officers to comply with a New York notice statute invalidated the arrest.

cation may be placed on wholly different grounds from those charged at the time of the arrest.

b. Entirely apart from constitutional considerations, the law of Kentucky appears to foreclose the Government's argument in this case. It is quite clear, of course, as the Government states, that "[t]he power of local police officers to make an arrest is determined by local law even in cases involving the federal constitutionality of a search. *Ker v. California*, 374 U.S. 23; *United States v. Di Re*, 332 U.S. 581" (Br. p. 16). Unaccountably, however, the Government fails to discuss whether in Kentucky an arrest is valid if there was probable cause to arrest for a crime different than that charged by the officer, but not for the crime for which the person was actually arrested.⁵ The answer is that, as the Kentucky Court of Appeals has held on a number of occasions and as is suggested by the passage from *Giannini v. Garland*, 296 Ky. 361, 367, 177 S.W.2d 133 (1944), set out in the Government's brief (p. 17), such an arrest is not valid.⁶ The leading Kentucky decisions are

⁵ The Government does discuss (Br. pp. 16-17) an argument in our opening brief relating to the Kentucky law of arrest. There we contended that it appeared that, for the arrest to be valid under Kentucky law, the offense of vagrancy would actually have had to be committed (Br. pp. 25-27). That is, reasonable cause would not be enough. We relied upon the language of the Kentucky arrest statute, as well as upon certain state search and seizure decisions. We distinguished the state decisions that adopted a contrary view on the ground that (a) the opinions disclosed they were based upon a separate drunkenness and disorderly conduct statute, and (b) they were all false arrest damage cases, and the Kentucky Court of Appeals has indicated it applies a more liberal standard in such cases than in search and seizure cases.

⁶ The Government's response is that in *Giannini v. Garland*, *supra*, the court "explain[ed] most of the arrest cases cited by petitioner" (Br. p. 17). This decision explains none of those cases, because it was (a) a false arrest damage case which (b) involved an arrest for public drunkenness.

⁷ The passage from *Giannini* is as follows:

"[A]n officer may arrest a misdemeanant without a warrant upon the ground that the offense was committed in his presence when he has reason-

Goins v. Hudson, 246 Ky. 517, 55 S.W.2d 388 (1932); *Hogg v. Lorene*, 234 Ky. 751, 29 S.W.2d 17 (1930); *Wright & Taylor v. Leigh*, 229 Ky. 32, 16 S.W.2d 493 (1929); and *Noe v. Meadows*, 229 Ky. 53, 16 S.W.2d 505 (1929).

Thus, in *Goins v. Hudson*, a false arrest action, there was evidence that the plaintiff had committed two offenses in the arresting officer's presence: public drunkenness and profane cursing and swearing. The officer testified that he had made the arrest for drunkenness. The trial court instructed the jury that the arrest was lawful if the officer had reasonable grounds for believing the defendant guilty of committing either offense in his presence. On appeal, the instruction was held erroneous, in part because, as the court said:

"The instruction . . . told the jury that Hudson had the right to arrest Goins if either he profanely cursed or swore, or was publicly drunk in his presence, or Hudson had reasonable grounds to believe that Goins was publicly drunk or profanely cursed and swore in his presence. Hudson admits that he arrested Goins for drunkenness, and for no other reason, and so informed Goins. That being true, *he could not justify upon another ground which did not cause him to make the arrest.* [Citing *Hogg v. Lorenz* and *Noe v. Meadows*.] It follows that the question of profane swearing should not have been included in the instruction." 246 Ky., at 522-523. (Emphasis added.)

able grounds to believe, and did believe in good faith' that the person arrested was guilty, but the foundation for such reasonable belief must be based and deduced from facts obtained by the officer through some one or more of his senses and not from information he may have received from third parties." 296 Ky., at 367 (quoting *Goins v. Hudson*, 246 Ky. 517, 55 S.W. 2d 388 (1932) (emphasis added)). See also *Sisemore v. Hoskins*, 314 Ky. 436, 439, 235 S.W. 2d 1011 (1951); *Couch v. Vanhoose*, 314 Ky. 36, 43, 234 S.W. 2d 169 (1950).

Hogg v. Lorens shows that the same rule applies in a case like this, where officers arrest for one misdemeanor (vagrancy) and it is claimed that the arrest could have been made for a different misdemeanor (loitering) or for a felony (car theft). In *Hogg*, the plaintiff in a false arrest action alleged that the defendant had wrongfully arrested him for a breach of the peace. The defendant contended that the plaintiff inferentially conceded a lawful arrest because he did not allege in his complaint (1) that no offense had been committed in the officer's presence, and (2) that the officer did not have reasonable grounds for believing that a felony had been committed. That contention was rejected for the following reasons:

"[The complaint] does charge that the officer falsely asserted that plaintiff had committed a breach of the peace in his presence, and wrongfully arrested him for that reason. In view of the specification of the very ground upon which the deputy constable assumed to act, it was necessary to negative only that particular assertion of authority. [Citing *Noe v. Meadows*.] If the officer acted upon one ground, he could not justify his act upon another, although he was free to avail himself of all the grounds which actuated his conduct. *Waddle v. Wilson*, 164 Ky. 228, 175 S.W. 382. It is the duty of an officer who proposes to make an arrest to inform the person about to be arrested of the offense charged against him (Criminal Code of Practice, sec. 39). . . ." 234 Ky. at 756. (Emphasis added.)

Indeed, in *Wright & Taylor v. Leigh*, the Kentucky court held, in substantially similar language, that an arrest for

¹ Section 39 of the Kentucky Criminal Code of Practice, now K.R.S. 431.025, applies equally to felony and misdemeanor arrests, and provides in pertinent part: "The person making an arrest shall inform the person about to be arrested of the intention to arrest him, and of the offense for which he is being arrested."

loitering, a misdemeanor, could not "be justified by showing that there were reasonable grounds for belief that a felony [burglary] had been committed" 229 Ky., at 34. And in *Nos v. Meadows*, the court applied the same rule in the converse of that situation—at the time of the arrest, the arresting officer had told the plaintiff that he was arresting him for possession of a stolen automobile, a felony, but when sued for false arrest, testified that he made the arrest because the plaintiff was using license plates issued for another car, a misdemeanor. The court stated that the defendant had not informed the plaintiff that such was the charge at the time of the arrest, observed that the officer's conduct had been inconsistent with an arrest for the lesser offense, and noted that the evidence showed that the officer first discovered the latter offense after making the arrest. But in any event, the court continued:

"The general rule is that, if an arrest without process is made on one ground, upon which it subsequently develops it cannot be sustained, the arrest cannot later be justified on the theory that another ground existed at the time of the arrest. 25 C.J. 496. sec. 67; *Malcolmson v. Scott*, 56 Mich. 459. 23 N.W. 166; *Snead v. Bonnoil*, 166 N.Y. 325, 59 N.E. 899; *Comisky v. N. & W.R. Co.*, 79 W. Va. 148, 90 S.E. 385; *Jones v. Van Bever*, 164 Ky. 80, 174 S.W. 795

"If, however, an arrest be actually made upon more than one ground, and justification be found in one ground only, that one ground may be relied on as a defense. 25 C.J. 496; *Waddle v. Wilson*, 164 Ky. 228, 175 S.W. 382.

"In this case the action taken by [defendant] was upon the ground that [plaintiff] was guilty of the crime of having a stolen automobile in his possession, and he

was bound to make good on the basis on which he proceeded or suffer the consequences. He could not rely upon an offense which he discovered after the arrest had been made, and which did not actuate him in making the arrest." 229 Ky., at 57-58. (Emphasis added.)⁸

Thus, under Kentucky law, the arrest in this case for vagrancy was unlawful because, as the Government concedes, the officers had no grounds for making an arrest under the vagrancy statute. Under Kentucky law, the alleged existence of other grounds which "did not actuate [the officers] in making the arrest" does not affect that conclusion.⁹

c. Finally, assuming that everything we have said to this

⁸ For similar cases in other jurisdictions, see *McNeff v. Heider*, 216 Ore. 583, 337 P.2d 819, 823 (1958); *Donovan v. Guy*, 347 Mich. 457, 80 N.W. 2d 190 (1956); *Moran v. City of Beckley for Use of Bowen*, 67 F.2d 161, 163 (4th Cir. 1933); *Lyons v. Worley*, 152 Okl. 57, 4 P.2d 3 (1931); *Geldon v. Finnegan*, 213 Wis. 539, 252 N.W. 369 (1934); *Schultz v. Eslow*, 201 Iowa 1083, 205 N.W. 972 (1925); 35 C.J.S. 681; Annot., *Justification in Action for False Imprisonment by Proof of Existence of Ground Other Than That on Which Arrest Was Made, or One of Several Grounds on Which It Was Made*, 64 A.L.R. 653 (1929).

⁹ It is true that these Kentucky cases all involved false arrest claims rather than search and seizure issues. However, the issue in each of the cases, as here, was the legality of the arrest, and no reason appears why the Kentucky courts would hold arrests illegal for false arrest purposes but legal for search and seizure purposes. Indeed, as we have indicated in our opening brief (p. 27), the Kentucky Court of Appeals has stated that "the code provisions authorizing arrest without a warrant have been construed with more particularity and perhaps with less liberality in upholding the legality of such arrests" where the issue is the legality of a search and seizure than where the issue is the legality of the arrest for false arrest purposes. *L. & N. R. Co. v. Creech*, 218 Ky. 147, 151, 271 S.W. 674 (1927). Moreover, since a substantial constitutional question would be raised by giving the Kentucky arrest statute the construction contended for by the Government, there is all the more reason for this Court to conclude that the statute means in this case exactly what the Kentucky courts have held it to mean in the cases cited in the text.

point is incorrect, nonetheless the Government's argument comes too late. As we have noted, until its brief in this Court the Government never suggested that the arrest could be justified except as an arrest for vagrancy. In consequence, as we have already indicated, defense counsel devoted their efforts to attacking the validity of the arrest in terms of the vagrancy statute. Therefore, were the Government now to be permitted to defend the arrest in terms of the loitering and auto theft statutes, petitioner would be deprived of an opportunity to examine the police and introduce evidence respecting the alleged probable cause for concluding that he had committed those crimes. This opportunity might be critically important. Thus, for example, in connection with the auto theft statute, counsel could have asked the officers if they had had any report of a theft of a vehicle fitting the description of Sykes' car (the answer would have been "No") or whether they had checked with the person from whom Sykes had purchased the car (the answer would have been "No"). And, in terms of the loitering statute, they could have asked the officers what it was at the time of arrest that they considered "disolute," "idle," "loafing," or "disreputable" about the petitioner. Again, under the Government's argument it should be assumed that the officers' reply would have been "Nothing." Plainly, even assuming there are now facts of record from which the Court could conclude that there was probable cause to arrest for such crimes, it cannot be said that answers of this type from the officers would not change the picture.

Just this type of situation was involved in *Giordenello v. United States*, 357 U.S. 480 (1958). There the Government, having attempted in the lower courts to justify a search on the basis of a warrant, attempted in this Court

to justify it also as a search incident to an arrest. The Court responded:

"We do not think that these belated contentions are open to the Government in this Court To permit the Government to inject its new theory into the case at this stage would unfairly deprive petitioner of an adequate opportunity to respond. This is so because in the District Court petitioner, being entitled to assume that the warrant constituted the only purported justification for the arrest, had no reason to cross-examine Finley or to adduce evidence of his own to rebut the contentions that the Government makes here for the first time." *Id.*, at 488.

3. *There was no probable cause for arresting petitioner for loitering or car theft.* Assuming *arguendo* that the Government may raise its "alternative probable cause" argument here for the first time and that it is valid, the fact remains that there was no probable cause for arresting either for loitering or for car theft.

a. As to loitering, the principal reason that probable cause cannot be found is that it is impossible to ascertain what the statute means. The Government attempts to brush aside the unconstitutionality question by asserting that arresting officers should not be required to make this sort of judgment (Br. p. 22). Putting aside the question whether this approach might ever be valid, surely it is not where the nature of the constitutional infirmity—vagueness—precludes an informed judgment as to whether there was probable cause to arrest.

As to the constitutionality argument as it applies to the loitering ordinance, we rely upon the discussion in our opening brief (pp. 35-40), which is as applicable to the

ordinance as it is to the vagrancy statute.¹⁰ The Government's attempt to supply definiteness to the ordinance is as follows: "[E]ven if the ordinance is vague in its outer contours," at its core it is "plainly aimed at persons who, having no employment or legal source of income, remain on the streets without any valid reason for their presence." Or, phrased differently, while "ordinary standing or sitting is not prohibited . . . loitering in a suspicious manner" is (Br. pp. 19 n. 9, 20, 22).

We are quite willing to submit the question of constitutionality in these terms. Either test suggested by the Government (and they are different) gives the police *carte blanche* to arrest anyone of whom they are suspicious. The standard of probable cause to believe a person has committed a particular crime would be supplanted by the test of probable cause *to be suspicious* that a person *may* commit *any* crime. Or, to put it differently, it would be a *crime* (not just grounds for interrogation to act in a suspicious manner "around the streets or within the limits of the City of Newport.")

While the Government contends that the "defendants' conduct in this case was the kind of conduct at the heart of the ordinance no matter how narrowly it might be read" (Br. p. 20), this serves only to illustrate how impossible it is to read the ordinance "narrowly." After all, so far as the police were aware (and so far as the facts appear to have been), the defendants simply had sat in an auto for some hours early in the morning and were unable to give what the police considered a satisfactory explanation for their presence. Surely the protection against arbitrary

¹⁰ We note that the Government attempts to distinguish *Edelman v. California*, 344 U.S. 357 (1953), on the ground that it involved a statute "entirely different [from] and more ambiguous [than]" the loitering ordinance (Br. p. 21 n. 12). The critical phrase in the *Edelman* statute was "a dissolute person," whereas here a person is guilty if he loiters "in [a] . . . dissolute . . . way."

police action that is conferred by the Fourth Amendment must forbid arrest, incarceration, and search and seizure based on such flimsy grounds, entirely apart from the consideration that the Government concedes that the ordinance purports to invest the police with even broader authority.

As we have suggested, the consequence of this ambiguity of the ordinance is not only that it is unconstitutional, but that it is impossible to determine whether or not the police had probable cause to arrest petitioner for its violation. We submit that it defies analysis to assess the evidence of record in terms of whether there was probable cause to conclude that the petitioner had loitered in an "idle, dissolute, disreputable or loafing way," or to conclude that he did not have "a legitimate business or visible means of support." Granting that he was loitering, considerably more is needed under the ordinance, as the Government says. But what is it? Is it sufficient that petitioner was unemployed, or must the police have believed that he was engaged in an illegitimate enterprise? What is loitering in an "idle" or "loafing" way as opposed to simply loitering? In short, however the vagueness problem be put, it cannot be avoided in this case if the arrest is to be measured in terms of the loitering statute; and we submit that the conclusion must be that the arrest was invalid because it cannot be said that there was probable cause.

b. There also was no probable cause to arrest petitioner for car theft. The Government observes that the defendants could produce no registration papers; but if this were a weighty consideration, we hazard the guess that great numbers of innocent people would risk arrest every day. The Government points out that the defendants had hardly any money with them and had been unemployed; but we suggest that the inference that a person in that situation probably has stolen whatever he has acquired recently if

it is worth a few hundred dollars (the auto was worth \$341.25 (R. 118)) is too strained. The Government suggests that it is significant that the defendants were parked in a central business area for a number of hours at an odd time of the morning; but we suggest that this would be one of the least likely things for a car thief to do. Finally, the Government points out that the defendants gave answers to the officers that they considered "evasive." But, while this served to arouse the officers' generalized suspicion that the men "[w]ere up for no good" (R. 18), it apparently never occurred to the officers, nor should it have, that the particular "no good" was auto theft.

More significant even than what appears of record is what does not. The officers did not testify, for example, whether there had been any report of the theft of an auto fitting the description of Sykes' car; whether they had telephoned the station to see whether there had been any such report; or whether prior to the arrest they had telephoned the person from whom Sykes had purchased the car. If the officers had gone before a magistrate with the information they had, and had admitted that they did not have any information of the type outlined above, the magistrate would have, or at least should have, refused a warrant of arrest for car theft. And, of course, our contention is given considerable support by the fact that the officers did *not* arrest the defendants for auto theft."

¹¹It is, to be sure, artificial to discuss this question as if the arrest had been made for auto theft. However, this is inevitable because of the artificiality of the Government's arguments, as is illustrated by passages in the Government's brief such as: "It is worth speculating as to what the officers should have done rather than arrest the three defendants [for car theft]." (Br. p. 32). In fact, we need not speculate. The officers did precisely the right thing: They did not arrest for auto theft.

B. Validity of the Search and Seizure

The Government's argument is that the search and seizure were valid because they were incident to the arrest for loitering or for car theft, and that they were also valid apart from the arrest because the officers had probable cause to believe the auto had been stolen.

1. *The search and seizure cannot be justified as incident to the arrest.* In the first place, for the reasons given above, the arrest was invalid, and hence the search and seizure cannot be upheld as incident thereto. In addition, the search and seizure were invalid for the reasons set forth in our opening brief at pp. 41-54. We discuss those reasons here only briefly in the context of the Government's argument.

a. Our contention that a search incident to an arrest for Vagrancy should be limited in scope to that which is necessary to protect the arresting officer and to make the arrest effective (Br. pp. 43-47) is applicable, of course, to an arrest for loitering. The Government responds:

"We suggest, although the point is not free from doubt, that, having made a valid arrest for vagrancy, the officers could search for instrumentalities and fruits of closely related crimes, such as assault and robbery. This is not, of course, to argue that officers are free to conduct a general search whenever they make a valid arrest." Br. p. 24.

Whatever the Government's argument may mean in other contexts, it means clearly enough that officers are to be free to conduct a general search whenever they arrest for vagrancy. And, given the character of many vagrancy statutes as vehicles for arrest on suspicion (see our open-

ing brief p. 31 n. 22), and in particular the character of the Newport loitering ordinance as construed by the Government (see *supra*, p. 19), this authority would be wholly inconsistent with the purpose of the Fourth Amendment to preclude general searches (see opening brief p. 44 and authorities there cited).

b. We also argued in our opening brief (pp. 47-49, 51-53) that the search and seizure were not valid because not contemporaneous with the arrest. The Government responds that the delay was slight, and that "[i]f the right to search the car existed at all, it included the right to search at a safe and suitable place" (Br. p. 24). While the question cannot be answered with certainty on the basis of precedent (compare the decisions cited in our opening brief, pp. 47-49, 51-53, with those cited by the Government, pp. 24-25), we submit that our position is the more reasonable. If the right to search incident to arrest is not confined to a search strictly contemporaneous with the arrest, so that the principal legitimating purpose of the search is to protect the officers and secure the arrest, it is difficult if not impossible, to ascertain where the right terminates in a case like the one at bar.¹² If a search can be conducted after the car has been removed to the police garage as long as it is made within half an hour, why not if it is made within half a month? It might be argued, as the Government appears to, that officers should have the right to "search [the auto] in a sheltered, lighted area without the necessity of watching three men on the street late on a winter night." But in the case at bar, the search was not

¹² Of course, as the Court noted in *Abel v. United States*, 362 U. S. 217, 230 (1960), where the person arrested takes property with him to the station, that property may be searched there, "as the search of property carried by an accused to the place of detention has additional justifications, similar to those which justify a search of the person of one who is arrested."

only removed from the arrest in terms of time, but more important, removed in terms of purpose. That is, there is no indication whatever that the officers intended to search the auto when they arrested the defendants. Rather, the search appears to have been only an afterthought. In such circumstances, we submit that the rule requiring a warrant should apply, not the incident to arrest exception.

c. We also argued in our opening brief that a further consideration indicating the unreasonableness of the search and seizure was that the police indisputably had ample time to secure a warrant after the car was taken into custody (Br. pp. 49-51). The Government's response is that they had no time to secure a warrant *at the time of arrest*, and that this is the only relevant time because "the officers had no right to move the automobile unless they could, contrary to petitioner's position, either seize or search it" (Br. 26). We do not agree with this all-or-nothing approach to the Fourth Amendment. We believe that, in a proper case, the police might well have the right to remove a car to a safe place without a warrant, but that this right should not carry with it the right to break open the trunk and seize whatever is inside without first securing a warrant. See *Rent v. United States*, 209 F.2d 893 (5th Cir. 1954), where as to such a question the Court stated:

"That probable cause . . . may very well have authorized the officer to take the automobile into custody, but we do not think that it justified him in searching the automobile a number of hours after the arrest and without a search warrant for which an application could then easily have been made." *Id.*, at 898.

d. Finally, we urged in our opening brief (p. 53) that relevant to the reasonableness of the search is the fact that no crime of vagrancy was committed in the presence

of the officers. We need add only that, so far as loitering is concerned, the same argument is applicable because the vagueness of the ordinance makes it impossible to determine whether defendants violated it; and, so far as auto theft is concerned, the record establishes that no such crime was committed.

2. *The search and seizure cannot be justified on the theory that there was probable cause to believe the auto had been stolen.* The Government's argument concerning the validity of the search and seizure independent of the arrests is unsound because:

First, as we have already indicated (*supra*, pp. 20-21), there was no probable cause to believe the car had been stolen.

Second, the officers did not purport to conduct the search or to seize the articles on the theory that the car had been stolen, and consequently, for the reasons set forth above (pp. 8-18) in connection with the Government's "alternative probable cause" argument, the Government is foreclosed from relying on such a theory now.

Third, in any event the search of a car in police custody should not be countenanced without a warrant.

So far as we have been able to discover and so far as the Government suggests, this Court has never held that the doctrine of *Carroll v. United States*, 267 U.S. 132 (1925), is applicable except where the car is truly "movable," i.e., where it is in control of someone other than the police. As is stated in one of the decisions cited by the Government, *United States v. Walker*, 307 F.2d 250, 252 (4th Cir. 1962), "the basic reason for the Carroll doctrine [is] that a vehicle by its very nature can be quickly moved out of the locality or jurisdiction in which the warrant might be sought" This view of the rationale of *Carroll* is

based upon the language used by the Court in that case, which could hardly be more clear. Thus, the Court stated that historically there has been a distinction drawn "as to the necessity for a search warrant between goods . . . when concealed in a dwelling house or similar place, and like goods in course of transportation and concealed in a movable vessel where they readily could be put out of reach of a search warrant." *Id.*, at 151. And again:

"... [T]he guaranty of freedom . . . by the Fourth Amendment has been construed, practically since the beginning of the Government, as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." *Id.*, at 153.¹²

Once more the Government's argument appears to turn upon its theory that, if the police had the right without a warrant to take the auto into custody by putting it in a garage, they also had the right to search it without a warrant. As we have already indicated, we do not believe that this is so. See discussion *supra*, p. 24. Rather, as the Court of Appeals for the Fifth Circuit held in *Rent v. United States*, 269 F.2d 893, 898 (1954), while the *Carroll*

¹² In *Brinegar v. United States*, 338 U.S. 160 (1949), the search took place after the police overtook the suspect in a chase; in *Husty v. United States*, 292 U.S. 694 (1931), the search took place after the suspect had entered his car, started it, and was about to drive away; and in *Scher v. United States*, 305 U.S. 251 (1938), while the suspect had driven the car into his garage immediately before the search took place, the Court emphasized that "[e]xamination of the automobile accompanied an arrest, without objection and upon admission of probable guilt." *Id.*, at 255.

doctrine may justify the police in taking an auto into custody, once it is secure it is no different than a house with respect to the warrant requirement.¹⁴

C. Deprivation of Assistance of Counsel

The Government's reply to our contention that the appointment of counsel to represent the three defendants jointly was at odds with *Glasser v. United States*, 315 U.S. 60 (1942), is that the issue is not properly before the Court because it was not raised in the lower courts or in the petition for certiorari; that in *Glasser* the counsel had objected to his double appointment, whereas here there was objection neither by petitioner nor by the attorneys; and finally that no prejudice is shown (Br. 40-41).

As to the failure of counsel to object in the trial court and to raise the issue in the Court of Appeals, this might have been due to the very conflict of interests in question. That is, dual representation may have been helpful to Sykes—one of the clients—but harmful to petitioner, as we suggested in our opening brief (pp. 55-56). This would probably not have been apparent to the attorneys immediately upon appointment; and if it became apparent thereafter, whose interest would they choose to serve?

And so far as petitioner's failure to object is concerned,

¹⁴ We suggest that there is considerable difficulty with the Government's theory that the Court need not go as far here as in *Carroll* because here, as opposed to *Carroll*, "there was no need to search an automobile which was not itself contraband while looking for contraband" (Br. 39). On the contrary, entirely apart from the matters discussed in the text, to sustain the search the Court would have to go further here than in *Carroll* precisely because the search was not aimed at discovering contraband. Assuming (contrary to fact) that the search was based upon the belief that the auto was stolen, what could the officers have been looking for except evidence of commission of a crime, as opposed to contraband or the means of commission of a crime? But, as this Court has consistently held, a search may not be made for articles that are "merely evidentiary." See authorities cited in our opening brief, p. 42, n. 28.

while it may be true that "[i]n every joint trial there are considerations in favor of, and against, both joint and individual representation" (Govt. Br. p. 41), this is hardly a judgment (one of "trial strategy" as the Government describes it) that should be made by the lay defendant. Petitioner was entitled to separate counsel to advise him as to this very point, and in the absence of such independent counsel he cannot be held to have waived the issue. Glasser was, after all, an attorney who served as an Assistant United States Attorney for more than four years, *id.*, at 88; and even in such circumstances the Court held that there had been no waiver by him even though, after an initial objection by him and a consequent withdrawal of the suggested appointment by the judge, Glasser remained silent when the attorney and the other defendant later told the judge that the appointment would be satisfactory.

So far as prejudice is concerned, as we indicated in our opening brief (pp. 55-56) there is in this case a distinct possibility of harm. Indeed, the Government does not appear to contend to the contrary, but contents itself with observing that there is also a possibility that petitioner was advantaged by the dual representation. Assuming this to be so, where it cannot be said whether there was prejudice or advantage, we urge that the proper course is reversal, not affirmance.

We do wish to note our hope, however, that the Court will dispose of the search and seizure issues before reaching this counsel contention, because a reversal on the latter ground alone would subject petitioner to the possibility of another trial at which the evidence here in question would again be offered. Especially in a case in which the conviction, even considering the evidence seized from the car, rests upon exceedingly flimsy grounds, we urge that such a possibility should be foreclosed.

One final point: The Solicitor General states in the Government's brief that he "has had some concern" with respect to the sufficiency of the evidence, but that he "has concluded that the case against petitioner was sufficient to warrant its submission to the jury" (Br. p. 12, n. 5). While we have not argued this issue separately, we have described the evidence and recorded our grave doubt as to its sufficiency (Br. pp. 16-19). After giving the matter considerable thought, we concluded that, while we share the Solicitor General's concern as to this issue, the other contentions open to petitioner are considerably stronger and, moreover, are presumably the issues that moved the Court to grant certiorari. Nonetheless, this point is, of course, open to the Court, and we naturally stand prepared to discuss the question should the Court so desire.

Conclusion

For the foregoing reasons, as well as for the reasons given in our initial brief, the judgment of the Court of Appeals for the Sixth Circuit should be reversed.

Respectfully submitted,

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